NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NO. 2013 KA 2146

STATE OF LOUISIANA

VERSUS

TROY HULBERT

Judgment Rendered: JUN 25 2014

On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
No. 07-11-0287, Sec. 7

The Honorable Donald R. Johnson, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

DRAKE, J.

The defendant, Troy Hulbert, was charged by bill of information with forcible rape, a violation of La. R.S. 14:42.1. He entered a plea of not guilty. Upon a trial by jury, the defendant was found guilty of the responsive offense of sexual battery, a violation of La. R.S. 14:43.1. The trial court imposed a sentence of four years of imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The trial court ordered that the sentence be served concurrently with any other sentences imposed in other cases. The trial court denied the defendant's motion to reconsider sentence. The defendant now appeals, assigning error to the verdict and alleging that it was defective because juror number four did not participate. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On November 23, 2010, the defendant, who was sixteen years old, had nonconsensual sexual intercourse with the victim (C.B.), who was thirteen years old at the time of the offense.[1] That same night, C.B. told a friend about the incident, but did not tell anyone else. Later, C.B. discovered she was pregnant. She then informed her mother and the police about the incident. The pregnancy was terminated, and DNA analysis of collected fetus tissue confirmed that the fetus could not be excluded as the biological offspring of the defendant.[2]

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[1] Herein, we use the initials of the victim in order to keep her identity confidential in accordance with La. R.S. 46:1844(W).

[2] As stipulated by the parties, "the analysis showed that it was twenty-six thousand times more likely to observe the genetic results of the defendant as the true biological father than if an unrelated black male was the father, two hundred thirty-five thousand times more likely than an unrelated random white male, one hundred and thirty-nine thousand times more likely than an unrelated random southeastern Hispanic male, and a hundred and sixty-eight thousand times more likely than an unrelated random southwestern Hispanic male."

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant contends that the trial court erred in finding the verdict in this case was proper. The defendant argues that the verdict did not comply with La. C.Cr. P. art. 810 since ten jurors were allowed to sign the "verdict form," although only the foreman is statutorily required to sign. The defendant further notes that juror number four, Darrell Carter, refused to sign the "verdict form" and did not participate in the polling. The defendant notes that this issue was raised in his motion in arrest[3] of judgment, further noting that there was no contemporaneous objection. The defendant contends that there is nothing in the record to indicate that juror number four participated in the deliberations. The defendant argues that the "ten-to-one verdict" in this case is a structural error that warrants automatic reversal.

Initially we note the record contains both a verdict form and a jury polling form. The trial court interchangeably referred to both forms as verdict forms. The actual verdict form is signed by only the foreman in accordance with La. C.Cr.P. art. 810. The jury polling form was apparently given to the jurors to assist them in calculating their votes during deliberations. On appeal, the defendant and the State also incorrectly refer to the jury polling form as a verdict form.

La. Const. art. I, § 17(A) provides, in pertinent part, that: "A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict." Further, La C.Cr.P. art. 782(A) provides that: "Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict." Herein, the defendant was charged with forcible rape, an offense necessarily punishable at hard labor. La. R.S. 14:42.1(B).

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[3] The motion in arrest of judgment was filed on the date of the sentencing. The trial court denied it in open court.

Accordingly, the defendant was entitled to a twelve-person jury. In order to be convicted, at least ten of those jurors had to concur in a "guilty" vote on the charged offense or one of the responsive offenses. The trial court properly instructed the jurors on the concurrence necessary to reach a verdict prior to deliberations.

The record reflects that the defendant's jury was comprised of twelve jurors and one alternate. Before deliberations, the trial court instructed the alternate juror to stand by. After the jury returned with a verdict, the trial court noted that juror number four, Darrell Carter, did not sign the "verdict form." The trial court stated, "Mr. Carter, I do not see a signature affirming or disaffirming your – your verdict in this matter; is that your decision in this matter?" Carter responded, "Yes sir." As to the rest of the members of the jury, ten of them signed the polling form to indicate that the verdict of guilty of sexual battery was also their individual verdict, and one signed to indicate that the verdict was not his individual verdict. After the verdict was read into the record, an oral polling was taken. Ten jurors responded "Yes" when asked if the verdict of guilty of sexual battery was their verdict, while one juror responded, "No. I'm -- I'm the one opposed." Juror number four simply confirmed that he did not sign the polling form. Thus, the oral polling was consistent with the written polling form. [4] After the oral polling, the trial court noted that a requisite ten members of the jury concurred in the verdict.

Though on appeal the defendant indicates that there was no contemporaneous objection to the verdict, once the jury exited the courtroom the defense counsel did in fact object to the verdict. The defense counsel stated as follows: "Your honor, at this time, Mr. Hulbert will object to the verdict, because it was decided by 11 votes with one abstaining. So therefore, there's 11 votes. We

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[4] La. C.Cr.P. art. 812 provides, in pertinent part, that: "The court shall order the clerk to poll the jury if requested by the state or the defendant. It shall be within the discretion of the court whether such poll shall be conducted orally or in writing[.]"

object to that. That's an improper form. We object to it." The trial court noted the objection and in response the State indicated that it accepted the verdict.

The trial court revisited the issue when the defense counsel filed a motion in arrest of judgment, again raising the argument that one of the jurors abstained. In denying the motion, the trial court stated, "What's this evidence or inference about failure of a juror to participate? I don't remember that happening." The trial court agreed with the State's indication that one of the members of the jury simply refused to state or declare his vote.

Assuming the defense timely objected to preserve this issue for appeal, we find that the verdict herein was proper. The record indicates that the matter was, in fact, submitted to a twelve-member jury. Accordingly, the defendant was not denied his right to a twelve-member jury pursuant to La. Const. art. I, § 17(A) and La. C.Cr. P. art. 782(A). There was no indication that juror number four did not participate in the deliberation process. Further, the number of jurors voting "guilty" was in compliance with the mandate that ten members must concur in order to render a verdict. See also *State v. Sanders*, 2011-160 (La. App. 3 Cir. 10/5/11), 74 So. 3d 284, 289, *writ denied*, 11-2495 (La. 3/30/12), 85 So. 3d 115, *cert. denied*, ___ U.S. ___, 133 S.Ct. 222, 184 L.Ed.2d 114 (2012). Accordingly, this assignment of error lacks merit.

CONVICTION AND SENTENCED AFFIRMED.